

BRB No. 13-0014

JAMES PITTMAN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HUNTINGTON INGALLS,)	DATE ISSUED: 07/09/2013
INCORPORATED)	
AVONDALE OPERATIONS)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Compensation Order Denial of Attorney's Fees Payable by Self-Insured Employer of David A. Duhon, District Director, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Traci Castille (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Compensation Order Denial of Attorney's Fees Payable by Self-Insured Employer (Case No. 07-194645) of District Director David A. Duhon rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Marcum v. Director, OWCP*, 12 BRBS 355 (1980).

Claimant filed a claim for compensation and medical benefits for a 75.3 percent binaural hearing loss on March 19, 2012. The district director gave employer formal notice of this claim on March 22, 2012. One week later, employer paid claimant

\$8,483.56 in compensation and accepted liability for medical benefits. On April 4, 2012, employer paid claimant an additional \$6,541.88, for a total of \$15,025.44. Employer contended this is the amount it owed for claimant's "second injury;" employer averred that 62.5 percent of claimant's hearing impairment was due to a prior injury, and was therefore the liability of the Special Fund pursuant to 33 U.S.C. §908(f).

On May 25, 2012, the district director issued a written "Informal Conference Recommendation," wherein he advised employer that it should continue paying benefits to claimant until an order granting its Section 8(f) application was issued. After seeking clarification from the district director concerning the status of its Section 8(f) application and its liability to claimant, employer sent letters dated May 31, 2012 to the district director and claimant stating it was reinstating benefits in accordance with the written recommendation.

Claimant's counsel subsequently submitted to the district director a petition for an attorney's fee of \$5,739.70 for work performed before the district director. The district director denied counsel an employer-paid attorney's fee. The district director found Section 28(a) inapplicable because employer did not decline to pay "any compensation" within 30 days of its receipt of the claim. 33 U.S.C. §928(a). The district director also found that employer cannot be held liable for an attorney's fee under Section 28(b) because employer accepted the district director's written recommendation within six days of its issuance.¹ Claimant appeals the district director's denial of an attorney's fee payable by employer pursuant to Section 28(a).² Employer responds, urging affirmance.

Claimant contends the district director erred in denying him an employer-paid attorney's fee under Section 28(a). We disagree. Section 28(a) states:

If the employer or carrier *declines to pay any compensation* on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the [district director], on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be

¹The district director advised claimant's counsel that he may apply for an attorney's fee pursuant to Section 28(c), 33 U.S.C. §928(c), as a lien on claimant's compensation.

²We affirm as unchallenged on appeal the district director's finding that claimant is not entitled to an employer-paid attorney's fee under Section 28(b). *Scalio v. Ceres Terminals, Inc.*, 41 BRBS 57 (2007). Moreover, the district director's finding is in accordance with law as employer accepted the written recommendation. *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009).

awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier. . . .

33 U.S.C. §928(a) (emphasis added). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, held in *Andrepont v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009), that if employer pays “any” or “some” compensation to claimant within the 30 days after it received notice of the claim from the district director, employer cannot be held liable for an attorney's fee pursuant to Section 28(a). *See also Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied*, 546 U.S. 960 (2005); *FMC Corp. v. Perez*, 128 F.3d 908, 31BRBS 162(CRT) (5th Cir. 1997); *Savannah Machine & Shipyard Co. v. Director, OWCP*, 642 F.2d 887, 13 BRBS 294 (5th Cir. 1981). In this case, employer paid some compensation to claimant within 30 days of its receipt of the claim from the district director. Contrary to claimant's contention, the fact that employer did not initially accept the whole claim because of its belief that Section 8(f) was applicable does not render employer liable for an attorney's fee pursuant to Section 28(a). *Andrepont*, 566 F.3d at 419, 43 BRBS at 29(CRT). As the district director's conclusion that employer is not liable for an attorney's fee pursuant to Section 28(a) accords with law, we reject claimant's contention of error and affirm the district director's Compensation Order. *Id.*

Accordingly, we affirm the district director's Compensation Order Denial of Attorney's Fees Payable by Self-Insured Employer.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge